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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 320

GEORGE B. PARR, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE B. PARR, PETITIONER

v.

BEN H. RICE, DISTRICT JUDGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court for the Southern District of Texas transferring the case from Corpus Christi to Laredo (R. 8–19) is reported at 17 F. R. D. 512. The oral opinion of that court granting the Government's motion to dismiss the indictment (R. 78–80) has not been reported. The majority opinion of the Court of

Appeals and Judge Cameron's dissenting opinion (R. 92–111) are reported at 225 F. 2d 329.

JURISDICTION

The judgment of the Court of Appeals was entered July 13, 1955 (R. 92). The petition for a writ of certiorari was filed on August 12, 1955, and was granted on October 17, 1955 (R. 132). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Petitioner's application to this Court for leave to file a petition requesting the issuance of prerogative writs to Judges Rice and Allred of the Western and Southern Districts of Texas is pending, No. 202 Misc., October Term, 1955.

QUESTIONS PRESENTED

Following his indictment for income tax violations in the Corpus Christi Division of the Southern District of Texas, petitioner was granted a change of venue to the Laredo Division of this same district, so as to avoid possible prejudice arising from newspaper hostility in Corpus Christi. Petitioner was then indicted for offenses relating to the same tax returns in the Western District of Texas. The government, electing to proceed in the Western District, applied to the Southern District for leave to dismiss the first indictment. The same judge who had ordered the change of venue rejected petitioner's contention that the government was improperly circumventing the venue order and

granted the motion to dismiss, explaining that he "gravely doubted whether in the administration of justice generally, the case should be tried in [the Southern D]istrict at all" (R. 78).

On appeal from the order dismissing the indictment, the merits were not reached since the order was held to be not appealable. In granting certiorari, this Court directed that the case be heard both "on the merits and on the question of appealability" (R. 132). Thus the questions presented are:

1. Whether the order dismissing the indictment in the Southern District is appealable.

2. Whether, under the Federal Rules of Criminal Procedure, the District Court, by granting a motion for change of venue from one division to another division of the same district, was thereafter totally without power to permit the government to dismiss the indictment over petitioner's objection.

3. Whether the district judge misconceived his functions or acted so arbitrarily that his order dismissing the indictment constituted an abuse of discretion.

STATUTES AND RULES INVOLVED

A. PROVISIONS RELATING TO APPEALABILITY

As regards the threshold problem of appealability, the provisions invoked by petitioner are

28 U. S. C. 1291 and 1651 (a). In pertinent part, 28 U. S. C. 1291 provides:

> § 1291. FINAL DECISIONS OF DISTRICT COURTS.
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court.

28 U. S. C. 1651 (a) provides:

> § 1651. WRITS.
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

B. PROVISIONS RELATING TO THE MERITS OF THE ORDER DISMISSING THE INDICTMENT

1. Petitioner's indictment in the Southern District of Texas was dismissed under Rule 48 of the Federal Rules of Criminal Procedure, which provides:

> RULE 48. DISMISSAL
>
> (a) By Attorney for Government.
>
> The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court.

If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

2. Petitioner's motion for change of venue from the Corpus Christi Division of the Southern District of Texas to the Laredo Division of the same district was made and granted under Rule 21 of the Federal Rules of Criminal Procedure, which provides:

RULE 21. TRANSFER FROM THE DISTRICT OR DIVISION FOR TRIAL

(a) For Prejudice in the District or Division.

The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

(b) Offense Committed in Two or More Districts or Divisions.

The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears

from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

(c) Proceedings on Transfer.

When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division.

3. The venue statute, which permitted petitioner's indictment both in the Southern District of Texas, where his tax returns were prepared and forwarded for filing, and in the Western District of Texas, where they were filed, is 18 U. S. C. 3237. It provides:

§ 3237. Offenses begun in one district and completed in another.

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

STATEMENT

Petitioner, a prominent resident of Duval County in the Corpus Christi Division of the Southern District of Texas, has been twice indicted for willfully attempting to evade income taxes by preparing or filing false and fraudulent tax returns for the years 1949, 1950 and 1951, in violation of Section 145 (b) of the Internal Revenue Code of 1939, 53 Stat. 1, 62, 26 U. S. C. (1952 ed.) 145 (b). The two indictments were substantially similar except for the allegations relating to venue.

In November 1954, petitioner was first indicted in the Corpus Christi Division of the United States District Court for the Southern District of Texas, where it was alleged that he had prepared the fraudulent returns for each year (R. 1–3). On April 27, 1955, District Judge Kennerly granted petitioner's motion to transfer this Southern District case from the Corpus Christi Division to the Laredo Division of that district (R. 8, 13–19). Then on May 3, 1955, petitioner was indicted in the Austin Division of the United States District Court for the Western District

of Texas, where it was alleged that he had filed his tax returns (R. 111–113). On May 4, 1955, the government filed a motion in the Southern District, under Rule 48 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 4), for leave to dismiss the first indictment (R. 19–27). On May 16, 1955, Judge Kennerly granted the motion to dismiss (R. 78–81).

On May 20, 1955, petitioner appealed from the order of dismissal (R. 81–82). On June 16, 1955, the government filed a motion in the Court of Appeals to dismiss the appeal, *inter alia*, on the ground that the order of dismissal was not appealable (R. 82–83). On July 1, 1955, petitioner sought permission from the Court of Appeals to file a petition for writs of mandamus and prohibition to prevent further proceedings in the Western District until petitioner's appeal from the Southern District's order of dismissal was finally determined (R. 83–90). The Court of Appeals, Judge Cameron dissenting, granted the motion to dismiss the appeal and denied leave to file the petition for writs of mandamus and prohibition, thus not reaching the merits of the challenged order[1] (R. 91–111).

The somewhat involved facts pertinent to the questions before this Court may be summarized as follows:

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[1] The order and judgment of the Court of Appeals were filed July 13, 1955 (R. 91–92). The majority and dissenting opinions were thereafter filed on July 22, 1955 (R. 92–111).

A. DISTRICT COURT PROCEEDINGS

The Southern District indictment was returned in the Corpus Christi Division on November 15, 1954 (R. 1): It contained three counts charging willfully attempted evasion of income taxes for the years 1949, 1950 and 1951 by means of affirmative acts committed in that divison (R. 1–3). The method of evasion charged was in preparing false and fraudulent income tax returns at San Diego, Texas,[2] and in depositing them in the office of the Collector of Internal Revenue in Corpus Christi for filing in the Collector's district office (which was located in Austin in the Western District) (*ibid.*). Following arraignment, petitioner entered a plea of not guilty (R. 3–5).

1. *The change of venue to Laredo:* In January 1955, petitioner moved, under Rule 21 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 5), for a change of venue from the Corpus Christi Division of the Southern District, and specified that the change should be made to the Laredo Division of the same district (R. 117, 119–123). This motion was based upon a claim of undue prejudice against him in the Corpus Christi Division resulting primarily from unfavorable

[2] Petitioner's residence was in San Diego, which is located in the Corpus Christi Division, approximately 50 miles from that city.

publicity in three Corpus Christi newspapers (R. 120–122). This motion was supported by a number of newspaper clippings and various affidavits made by citizens residing within the division expressing the opinion that petitioner would not get a fair trial in Corpus Christi (R. 78).[4] The motion also contained a one-sentence general allegation that substantially similar prejudice existed in the Brownsville, Galveston, Houston, and Victoria Divisions of the Southern District (R. 122). In the brief which petitioner filed in support of this motion, his counsel stated (R. 17):

> We wish to be clearly understood that if the case is not to be transferred to Laredo we prefer that it remain in Corpus Christi.

In the government's reply to this motion, the United States Attorney (a) informed the court that the government "desires a fair trial", and that it did not oppose a transfer to secure such trial in the event of a finding that petitioner would be prejudiced by the newspaper publicity

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[3] Petitioner also claimed that prejudice had resulted from certain investigations which had preceded his indictment (R. 122).

[4] In the Appendix (*infra*, pp. 77–82) we have set forth, as illustrative of the affidavits filed both by petitioner and by the government, two affidavits given by Hayden W. Head, a leading member of the Corpus Christi Bar. In the first of these affidavits (*infra*, pp. 77–81), he expressed the view that petitioner could not get a fair trial in Corpus Christi; in the second (*infra*, pp. 81–82), he stated that he was equally of the opinion that trial in Laredo would not be fair to the government.

(R. 124); (b) questioned petitioner's claim that a fair trial could not be had in Corpus Christi (R. 124–126); and (c) strongly challenged petitioner's right to specify Laredo as the only place to which transfer could be made on a finding of prejudice in Corpus Christi (R. 123–131). He pointed out that petitioner's insistence upon trial in Laredo was particularly incongruous, since the circulation of the newspapers constituting the principal alleged source of unfavorable publicity was relatively very much greater in the Laredo Division than in either the Houston or Galveston Divisions of the Southern District (R. 124–125, 127–131).[5] He urged that, if petitioner's real purpose was to avoid the alleged prejudicial influence of these newspapers, the transfer should be to a place outside the Southern District or to a division in the district, such as Houston or Galveston, where the circulation of the newspapers in question was negligible (R. 124–126; cf. R. 55).

The government also submitted numerous supporting affidavits from residents of the Southern District, both from the Corpus Christi and Laredo divisions.[6] With one or two exceptions the Corpus

[5] The circulation of the papers named by petitioner was shown to be respectively twenty and fifty times greater in the Laredo Division than in the Galveston and Houston Divisions (R. 124–125, 127–131).

[6] We are filing with this Court photostatic copies, certified by the clerk of the District Court for the Southern District, of the government's supporting affidavits.

Christi affiants stated that they had not been prejudiced by the newspaper publicity and that they believed that petitioner could and would get a fair trial in that city. The Laredo affiants and many of those from Corpus Christi expressed a strong belief that the government could not get a fair trial in the Laredo Division because of the nearly absolute political control exercised in the Laredo area by petitioner and by those allied with him (see *e. g.* App., *infra*, at pp. 81–82).[7]

On April 27, 1955, Judge Kennerly granted petitioner's motion and directed that the case be transferred to the Laredo Division, filing a memorandum opinion in which Judge Allred concurred (R. 8, 13–19). On May 16, 1955, the order of transfer was signed (R. 29–30). The court found that petitioner and his close associates had received much unfavorable publicity in the named Corpus Christi newspapers relating to political matters, elections, law enforcement, taxation, the killing at night of a young man at Alice, Texas, impeachment proceedings affecting certain judicial and other officers of Duval County, and various other matters (R. 14–16). On the basis of this publicity, the court held that petitioner had established his claim of prejudice so that the

[7] Substantially the entire Laredo Division lies within the same Texas State Senatorial District in which petitioner is the recognized political leader. 28 U. S. C. 124; Vernon's Tex. Anno. Stat. (1955 Supp.) Art. 193; and see especially V. O. Key, Jr., *Southern Politics in State and Nation* (Alfred N. Knopf, 1950), pp. 273–275. Cf. R. 131.

trial should not be held in Corpus Christi (*ibid.*). Judge Kennerly further decided that he totally lacked power to transfer the case anywhere other than to Laredo, since petitioner was insisting upon transfer to Laredo and would not consent to transfer elsewhere (R. 16–18). His opinion stated (R. 17):

> It is, therefore, under the law not within the power of the Court to transfer the case to either the Houston, Galveston, Victoria or Brownsville Division, but only to the Laredo Division.

The judge also noted his conclusion that the government would not "be under a severe handicap" if the case were transferred to Laredo (R. 18–19).[8]

2. *The Western District indictment:* On May 3, 1955, petitioner was indicted in the Austin Division of the Western District of Texas (R. 111). The offenses charged in this second indictment were willfully attempting to evade income taxes for the years 1949, 1950 and 1951 by filing false and fraudulent returns with the District

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[8] This conclusion must be read with Judge Kennerly's subsequent opinion announced May 16, 1955, when he granted the government's motion to dismiss the transferred indictment (R. 78–80). In this May 16 opinion he stated that while he had concluded that the case should not be tried in Corpus Christi, he "gravely doubted whether in the administration of justice generally, the case should be tried in this [Southern D]istrict at all" (R. 78). (See *infra*, pp. 17–18.)

Collector of Internal Revenue in Austin (R. 111–113).

Both the original Corpus Christi indictment in the Southern District and the subsequently returned Austin indictment in the Western District thus covered substantially the same offenses, willful evasion of income taxes for the three years in question (R. 1–3, 111–113). Only the facts alleged in order to establish venue differed. The Southern District indictment charged the preparation of the false income tax returns in San Diego, Texas, and the depositing of the returns in the Collector's office in Corpus Christi (R. 1–3). The Western District indictment charged filing the false returns in the Collector's office in Austin (R. 111–113).

3. *The dismissal of the Southern District indictment:* On May 4, 1955, the United States Attorney filed a motion in the Southern District, pursuant to Federal Rule 48 (a) (*supra*, p. 4), for "leave of court" to dismiss the indictment in that district (R. 19–22). This motion was in the form of a *nolle prosequi* (*ibid.*). It directed the court's attention to the return of the Western District indictment against petitioner and was accompanied by a written state-

ment of reasons for the requested dismissal[9] (R. 22–27). Judge Allred referred this motion for leave to dismiss to Judge Kennerly, who had heard and granted petitioner's motion for change of venue (R. 27–29). On May 16, 1955, the motion to dismiss came on for hearing, and Judge Kennerly overruled the government's contention that petitioner had no standing to object to the entry of the dismissal order, stating (R. 48–49):

> I repeat, counsel, that the wording of the rule contemplates that there is some—I don't know how much—discretion with the Judge of the Court. In exercising that discretion, I think I ought to have the facts. If the defendant in the case has any facts he wants to present to me, whether from the District Attorney or otherwise, in the exercise of that discretion, if I have that discretion, I think I should hear it * * *.

The court thereupon allowed petitioner to present evidence in opposition to the requested dismissal and to call the United States Attorney as a witness (R. 48–59).

At the hearing, the United States Attorney informed Judge Kennerly that the initiation of

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[9] The motion was also accompanied by a copy of a telegram from Assistant Attorney General H. Brian Holland authorizing the dismissal of the Southern District indictment "if and when" petitioner was indicted in the Western District (R. 20).

the prosecution in the Western District had been undertaken to accomplish what the court had construed as being beyond its power to do (R. 23–24). He explicitly stated that the return of the new indictment in the Western District and the request for dismissal in the Southern District was based in substantial part on an apprehension that the prosecution would be handicapped by a trial in Laredo (R. 23–24, 26, 40–42, 53–55), the seat of petitioner's political power (R. 41; cf. R. 15–16, 18).[10] He pointed out that, in order to prove the government's case, testimony would have to be elicited from residents of Laredo, and from long-time acquaintances and friends of petitioner who would be reluctant or hostile witnesses, and that these witnesses would be in a position to testify more freely, honestly, frankly and truthfully the further removed they were from the border district in which Laredo was located and which was in the area of petitioner's political influence (R. 22–27, 41–42, 53–54).

It was also brought to the court's attention that the establishment of venue and proof of the offenses would be somewhat simpler under the second indictment, and that this factor of simplification of venue proof had in the past led to prosecutions for income tax evasion being customarily brought in the Austin Division, where the returns from the South Texas area were filed,

[10] See footnote 7, *supra*, p. 12.

rather than in the district and division of the taxpayer's domicile (R. 38). However, it was explained that prosecution in the instant case had been initially referred to the Southern District in view of impending personnel changes in the Western District, involving the then incumbent United States Attorney for that district and a substantial portion of his staff (R. 39–40).[11]

Petitioner conceded that there was no legal inhibition against his being indicted for the same offenses in two districts of coordinate jurisdiction (R. 63) and that dismissal with court approval was within the power of the Attorney General and the United States Attorney (R. 32–33, 77). Nevertheless, he vigorously urged on Judge Kennerly that the government's purpose was to circumvent the judge's order of transfer and that, in the exercise of his discretion, the requested dismissal should not be allowed (R. 30–34, 60–77).

After hearing testimony and argument (R. 34–77), Judge Kennerly granted the government's motion and directed that the indictment be dismissed, rendering an oral opinion at the close of the hearing (R. 78–81). In this opinion he referred to his previous decision transferring the

[11] The incumbent United States Attorney did not leave office in the Western District until approximately two months after the Southern District grand jury had returned the first indictment against petitioner.

case from Corpus Christi to Laredo, and stated (R. 78-79):

> In * * * examining the record, I reached this further conclusion, that *I gravely doubted whether in the administration of justice generally, the case should be tried in this district at all.* I reached that conclusion, not as favoring either the Government or the defendant, but more from the standpoint of a judge who is charged with the administration of justice in the district.
>
> But when I came to examine the law, I found that I was without power to transfer the case outside of the Southern District of Texas. * * * If I had had that authority I would have sent it to Amarillo, or Sherman, or Texarkana, or some of those places as far removed from the scene of the troubles as I could, or as I could find. I would have done that not, as I say, to favor either the defendant or the Government, because I feel that justice in the case would be best administered by transferring the case to one of those places.
>
> But as stated, I could not do that as I understand the law. I then discovered that I could not transfer the case to any other division of the district except Laredo. * * * [Emphasis added.]

He further noted that, under Rule 48 (a) (*supra*, p. 4), he evidently had "some discretion * * * as to the matter of whether the case should or should not be dismissed," and that (R. 79):

> In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was of course under the old law, and under the present rules. If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue,[12] has shown any reasons why the case should not be dismissed.

4. *Subsequent proceedings in the Western District:* On May 25, 1955, petitioner moved in the Western District to stay all proceedings in that district pending the determination of the appeal which he had filed from the Southern District's order dismissing the transferred indictment (R. 113–115). Petitioner also moved in the Western District (a) to dismiss the indictment in that district based on an alleged lack of jurisdiction resulting from Judge Kennerly's change of venue order and (b) for transfer of the Western District indictment to Laredo or to Corpus Christi [*sic*] (R. 87–88). These motions were all denied (R. 87–88). Subsequently,

[12] As Judge Kennerly here noted, his order of dismissal was based not only on the hearing on the notice to dismiss, but also on the record on the change of venue motion.

the government asked for and was granted a continuance of the trial on the indictment in the Western District pending decision in this Court on certiorari.

B. APPELLATE PROCEEDINGS

On May 20, 1955, petitioner filed a notice of appeal from the Southern District's order of dismissal (R. 81–82). On June 16, 1955, the government filed a motion to dismiss petitioner's appeal, on the grounds that (a) the order of dismissal was not a "final decision" within the meaning of 28 U. S. C. 1291; (b) reinstatement of the prosecution in the Southern District would be futile since the government could elect to prosecute the indictment in the Western District to a final decision irrespective of the pendency of a similar indictment in the Southern District; and (c) the appeal was frivolous as obviously without merit and taken for the purpose of delay (R. 82–83).

On July 1, 1955, after his motions in the Western District for a stay, dismissal, or transfer, had been denied (R. 87–88), petitioner sought leave of the Court of Appeals to file a petition for writs of prohibition and mandamus to be issued to the District Court for the Western District to prevent that court from proceeding further pending the final determination of the appeal from the Southern District's order dismission the transferred indictment (R. 83–90).

By a divided vote, the Court of Appeals dismissed the appeal and denied petitioner leave to file his petition for the prerogative writs (R. 91–111). In an opinion by Chief Judge Hutcheson, the court held that the order appealed from was not a final order for purposes of appeal, since it did not terminate the matter in controversy, *i. e.*, petitioner's guilt or innocence of the crime of tax evasion (R. 92–97).

Judge Cameron dissented (R. 97–111), on the grounds that the appealability of the order of dismissal presented a question sufficiently serious to justify hearing and argument, and that the status quo should be maintained by mandamus and prohibition until a hearing on the merits. He also indicated his view that, even if the order were not appealable, the Court of Appeals could grant mandamus and prohibition ordering the Southern District to vacate the order of dismissal and proceed with the trial, if the facts justified such action (R. 103), even though petitioner had not asked the Court of Appeals to issue these writs to compel action from the Southern District. Judge Cameron further stated that he thought that the facts justified granting relief (R. 103), and indicated his belief that Judge Kennerly had applied the wrong test in granting the gov-

ernment leave to dismiss the Southern District indictment (R. 110–111).[13]

In this Court petitioner sought a writ of certiorari to review both the dismissal of his appeal and the refusal to grant him leave to file his petition for the prerogative writs seeking to preserve the status quo in the Western District.[14] In addition, he also presented a motion for leave to file a petition for writs of mandamus and prohibition (No. 202, Misc., Oct. Term, 1955), to be issued (a) to Judge Allred in the Southern District directing the reversal of Judge Kennerly's order of dismissal of the first indictment, and (b) to Judge Rice in the Western District directing transfer of the second indictment to Laredo. Petitioner's motion to this Court for leave to file his petition for these prerogative writs is still pending.

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[13] Judge Cameron's views on the merits were made without the benefit of a presentation from the government on these matters. The court's decision dismissing the appeal was handed down before the due date of the government's brief on the merits, which was therefore never filed.

[14] Since the court in the Western District entered an order, on application of the government, granting a continuance of the case in that district pending this Court's decision on certiorari, the propriety of that part of the Court of Appeals' judgment relating to the prerogative writs has been rendered moot.

SUMMARY OF ARGUMENT

I

The order granting the government "leave of court" to dismiss the first of two similar indictments pending against petitioner does not appear to be appealable, since (a) petitioner has not been aggrieved; (b) no final appealable order has been entered relating to the matters in controversy; and (c) none of the exceptions to the final order rule appear to be applicable. Nor is this order subject to review by prerogative writ.

A. In order to have any standing to appeal, a party must have been aggrieved by the judgment which he seeks to have reviewed. Petitioner has not been aggrieved by the dismissal of an indictment returned against him. *Lewis* v. *United States,* 216 U. S. 611. His claim of aggrievement seems to rest upon a contention that the prior decision transferring the first indictment from Corpus Christi in the Southern District to Laredo in the same district gave him a vested right to be tried in Laredo, even though a valid indictment had been subsequently returned in the Western District involving substantially the same offense. However, it is wholly immaterial, as regards the matter of aggrievement, whether or not the order of dismissal constitutes a bar to a subsequent prosecution for the same offense. Cf. *Heike* v. *United States,* 217 U. S. 423.

Petitioner's lack of aggrievement is well illustrated by analyzing his position in the event that

the Southern District indictment were reinstated against him, as he claims is his right. In that event, there would be two indictments pending against him, and the Attorney General, acting within his well-recognized powers, would have both the right and duty to elect under which of the two he would proceed. A court will not make the choice for the Attorney General as to which of two indictments he must prosecute, if jurisdiction lies in more than one court. *Haas* v. *Henkel*, 216 U. S. 462.

B. A second obstacle to petitioner's standing to appeal is presented by the absence of an appealable final order. "In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation * * * on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.'" *Berman* v. *United States*, 302 U. S. 211, 212–213. Strict adherence to this rule of finality is essential in criminal cases to avoid encouraging the kind of delay which is fatal to the proper administration of justice. See *Cobbledick* v. *United States*, 309 U. S. 323, 324–327.

Petitioner finds himself upon the horns of a dilemma as regards his claims of finality and aggrievement: His claim of finality rests upon an attempt to treat the order of dismissal as one finally terminating his prosecution in the Southern District. His claim of aggrievement seems to rest upon the pendency of the Western District

indictment. If the dismissal is to be viewed in conjunction with the second indictment for purposes of aggrievement, then the order of dismissal is not final for purposes of appeal, but simply an interlocutory step in the criminal proceedings against petitioner.

C. None of the exceptions to the final order rule developed in such cases as *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, appears to be applicable to the instant case. Petitioner has already incorporated the proceedings in the Southern District into the record of the proceedings in the Western District. He has moved in the latter district to dismiss that indictment or to transfer it to the former, on the ground that he had a vested right to be tried where he was first indicted. Appellate review as to the correctness of the overruling of these motions must await an appeal from a final conviction in the Western District prosecution. If petitioner's contention that he has in fact a vested right to be tried in Laredo by virtue of the transfer order should by any chance be a valid one, it would follow that his trial in the Western District would be improper, thus entitling him to a reversal in the event of a conviction. When reduced to its essence, petitioner's contention amounts to no more than that he will be put to the inconvenience and expense of a trial before he can be heard on his contention of error. This possibility does not warrant departure from the

rule of finality. *Heike* v. *United States*, 217 U. S. 423.

The only possibility of which we are aware which might permit an exception to the rule of finality, is that suggested in *Holdsworth* v. *United States*, 179 F. 2d 933, 935 (C. A. 1), where "the practical need for clarification overcomes the reluctance to issue what may be termed obiter dictum". However, this exception has never been recognized by this Court.

If the issues relating to the merits are reviewable under some exception to the final judgment rule, there is no need to consider the application for the issuance of the prerogative writs of mandamus and prohibition sought by petitioner in No. 202 Misc. On the other hand, if the order of dismissal is not appealable, there is no occasion for this Court to grant such extraordinary relief, which will only be granted when necessary to protect appellate jurisdiction. The request made to the court below for writs of mandamus and prohibition, to stay proceedings in the Western District pending appeal, has been rendered moot, since the District Court has itself stayed the prosecution until informed of this Court's disposition of the case at bar.

II

Petitioner's basic contention on the merits is that a federal district court, in which an indictment is pending following a change in venue, is

totally without power, under the Federal Rules of Criminal Procedure, to grant leave to the government to dismiss the indictment, over the indicted defendant's objection, irrespective of the circumstances and the extent to which the interests of justice would be best served by permitting the dismissal. This novel contention is utterly without merit and is in no way supported by the history, text or context of the applicable rules. Rule 48 (a) (*supra*, p. 4), authorizing the dismissal of an indictment by "leave of court", expressly limits the power to grant such leave only in cases where the trial has actually begun. No other exception or limitation can be read into this rule. The fact of transfer has no bearing on the court's power to dismiss in a proper case.

In contending that the Attorney General can no longer make a choice of the place of prosecution on two indictments pending in different districts, once there has been a change of venue ordered as to one of the indictments, petitioner relies on the failure of the rules to provide any right in the prosecution to move for a change of venue. Petitioner's argument totally overlooks the Advisory Committee's explanation that the absence of such a right in the prosecution rests on the constitutional right of a defendant to trial where the offense was committed. Since the offense of tax evasion alleged in the Western Dis-

trict indictment was committed in that district, there is no possible question of transgressing on any of petitioner's constitutional rights. Rule 21 (*supra*, pp. 5–6) left the matter of the place of trial for a crime committed in two districts to the sound discretion of the court.

Petitioner also overlooks the rule that interlocutory orders are not *res judicata* and that it was within Judge Kennerly's power both to vacate his order of transfer to Laredo and to dismiss the indictment, his jurisdiction being coextensive with the judicial district in which both the Corpus Christi and Laredo Divisions were located.

III

The order dismissing the indictment in the Southern District constituted a proper exercise of discretion on the part of District Judge Kennerly.

A. Petitioner's contention that Judge Kennerly did not understand that he had any discretion in the matter or that he misconceived his functions is completely rebutted by his statements in his opinion (R. 79), by his remarks made during the course of the full hearing given to petitioner (R. 48–49), and by his careful explanation of why he was granting leave to dismiss the indictment (R. 78–79). Judge Kennerly's significant comments, which directly refute petitioner's contention that the judge "clearly assumed that

he had no discretion to deny the Government's motion to dismiss" (Pet. Br. 21), include such remarks as "[u]nder the rule * * * evidently there is some discretion in the Court as to the matter of whether the case should or should not be dismissed" (R. 79). He also stated (*ibid.*):

> If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown any reasons why the case should not be dismissed.

Manifestly the court was exercising a real discretion in authorizing the dismissal.

B. Judge Kennerly expressly concluded that the interests of justice would be best served by having the case heard outside of the Western District (R. 78), thus squarely rebutting petitioner's claim that, if the judge had exercised any discretion at all, his order of dismissal was so arbitrary as to constitute an abuse of discretion.

No "unfair advantage" was sought by the government in bringing the first indictment in the Corpus Christi Division of the Southern District. This was petitioner's home district and indictment there comported with current policies of income tax law enforcement involving, in appropriate

cases, indictment in taxpayer's vicinage rather than in the judicial district in which his returns were filed. Furthermore, at the time the matter was presented to the Southern District grand jury, a serious personnel situation existed in the Western District, involving the expected departure of the then incumbent United States Attorney and a very substantial portion of his staff.

Petitioner's display of indignation is belied by his own preference of Corpus Christi over any place-of-trial other than Laredo, a seat of petitioner's political influence. When the government did not oppose a transfer to secure a fair trial, petitioner's counsel told the court (R. 17):

> We wish to be clearly understood that if the case is not to be transferred to Laredo we prefer that it remain in Corpus Christi.

If petitioner's real purpose had been to avoid the alleged baleful influence of the Corpus Christi newspapers which was advanced as the principal ground for a change of venue, he should have sought transfer not to Laredo, but to the Houston or Galveston Divisions of the Southern District, in which their circulation and influence was tremendously smaller, or to a place outside the district. While Judge Kennerly concluded that the government would not "be under a severe handicap" by trial at Laredo (R. 18–19), this conclusion must be read with the same judge's statements that he "gravely doubted whether in the administration of justice generally, the case

should be tried in [the Southern D]istrict at all" and that the case should have been sent as far from the scene of the trouble as could be found (R. 78).

If there be error in the record, it is in Judge Kennerly's view that under Rule 21 (a) (*supra*, p. 5) petitioner could choose the district of transfer, and in failing to recognize that, when petitioner made his motion for change of venue, he necessarily waived his constitutional privilege to have his trial in the district and division of the offense. Thus initially, the transfer should have been to where the court found that the proper administration of justice and fairness to both petitioner and to the government required the case to be sent.

There is no merit to the further contention that the return of the indictment against petitioner by the grand jury for the Western District, which had jurisdiction of the offense, and the government's dismissal of the earlier indictment in the Southern District after securing "leave of court" to do so, together constituted a misuse of the power to terminate. The government fully informed Judge Kennerly of the reasons why the sequence of events made necessary and desirable its request for leave to dismiss the Southern District indictment. Under Rule 48 (a) (*supra*, p. 4), the government's reasons for wanting dismissal were subject to review by the district court in which the indictment to be dismissed was pending.

The government requested the dismissal for proper reasons, and the District Court exercised a sound discretion in the matter, which should be left undisturbed.

ARGUMENT

Petitioner's basic contention on the merits is a wholly novel one. He argues that a federal district court, in which an indictment is pending following a change of venue, is totally without power, under the Federal Rules of Criminal Procedure, to grant leave to the government to dismiss the indictment, over the indicted defendant's objection, irrespective of the circumstances and of the extent to which the interests of justice would be best served by permitting the dismissal (Pet. Br. 12–19). This contention is utterly without merit. No decision of any court has so held, or even suggested that this might have been the object of the rules, and the contention finds no support in their language, purposes, or history (see *infra*, pp. 50–57). Petitioner further contends that in this particular case the district judge who granted the motion to dismiss misunderstood the scope of his discretionary power under Rule 48 (a) (*supra*, p. 4) (Pet. Br. 19–23). Petitioner also implies throughout his brief that the court acted so arbitrarily in dismissing the indictment that the order of dismissal constituted an abuse of discretion (Pet. Br. 12–23). These

additional contentions are equally erroneous and unsubstantial (see *infra*, pp. 57–75).

However, before reaching the merits of the order dismissing the transferred indictment, it is necessary to determine whether this order is appealable. At this stage of the litigation we would prefer to have a decision from this Court on the merits, so as to forestall the possibility of further delay. However, we consider ourselves obligated to raise and brief this threshold question of appealability, in view of (a) the holding below that the order was not appealable; (b) this Court's directive, in its order allowing certiorari (R. 132), that the case would be heard on the question of appealability as well as on the merits; and (c) the complete absence of any decision or authority permitting a defendant to appeal either from a *nolle prosequi* or from any other dismissal of an indictment returned against him.

I

THE ORDER GRANTING THE GOVERNMENT'S MOTION TO DISMISS THE INDICTMENT DOES NOT APPEAR TO BE APPEALABLE

A. *Petitioner has not been aggrieved by the dismissal of the indictment against him*

It is a fundamental requisite of appealability in both criminal and civil cases that the party taking the appeal must be aggrieved by the judgment which he seeks to have reviewed. *Lewis* v. *United States*, 216 U. S. 611; *Farmers' Loan*

and Trust Co. v. *Waterman*, 106 U. S. 265; *United States* v. *Adamant Co.*, 197 F. 2d 1, 5 (C. A. 9), certiorari denied *sub nom. Bullen* v. *Scoville*, 344 U. S. 903; *Schaaf* v. *State*, 221 Ind. 563, 49 N. E. 2d 539. An order dismissing an indictment cannot aggrieve the defendant, since it terminates all further prosecution under the dismissed indictment. *Lewis* v. *United States*, *supra*;[13] *Schaaf* v. *State*, *supra*. In that posture of a case, there is no longer any justiciable controversy before the court. Cf. *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240–241; *Cover* v. *Schwartz*, 133 F. 2d 541, 546 (C. A. 2), certiorari denied, 319 U. S. 748.

Petitioner's claim of aggrievement seems to rest upon his contention that the prior transfer from Corpus Christi in the Southern

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[13] Petitioner attempts to discount the impact of the unanimous holding in *Lewis*, by suggesting that the statement of an alternative ground for decision, *i. e.*, mootness caused by the running of the statute of limitations, was intended to limit the Court's express holding that no aggrievement results from a dismissal on *nolle prosequi* (Pet. Br. 26). Petitioner's argument is directly rebutted by this Court's unanimous decision at the same term in *Heike* v. *United States*, 217 U. S. 423, denying an interlocutory appeal to establish a claim of immunity prior to the entry of a final judgment of conviction. See also *Ex parte Altman*, 34 F. Supp. 106, 108–109 (S. D. Cal.), in which Judge Yankwich stated: "But the order of dismissal was neither a judgment nor was it final. A dismissal or nolle prosequi does not work an acquittal. * * * Nor is it an appealable order."

District to Laredo in the same district gave him a vested right to be tried in Laredo, even though a valid indictment had been subsequently returned in the Western District involving substantially the same offense.[16] However, it is wholly immaterial, as regards the matter of aggrievement necessary to give a defendant standing to prosecute an appeal, whether a second prosecution is pending or threatened, or whether the order of dismissal may be used as a defense to a subsequent prosecution.

Neither at the common law, nor in the federal courts prior to the adoption of the Federal Rules of Criminal Procedure, did a *nolle prosequi* work an acquittal or bar a second prosecution for the same offense or constitute jeopardy, provided the dismissal was made prior to the commencement of trial. *Dealy* v. *United States*, 152 U. S. 539, 542; *Wolff* v. *United States*, 299 Fed. 90 (C. C. A. 1); and cases cited in *Ex parte Altman*, 34 F. Supp. 106, 108–109 (S. D. Cal.). However, once the trial had begun and a jury impaneled, a dismissal without the consent of the defendant operated as an acquittal and barred further prosecution. See *Commonwealth* v. *Hart*, 149 Mass. 7, 8, 20 N. E. 310; and authorities cited in Orfield, *Criminal Procedure From Arrest to*

[16] As in shown *infra* at pp. 50–57, this claim is wholly without merit.

Appeal (N. Y. Univ. Press, 1947), pp. 338–340." In this latter event, the dismissal would have the same effect as a plea of former acquittal, giving rise to no right to appellate review unless and until a final judgment was entered against the defendant in a further prosecution involving the same offense. Cf. *Heike* v. *United States*, 217 U. S. 423.

Nothing illustrates better the absence of any aggrievement in the case at bar than a consideration of petitioner's position in the event that reinstatement of the prosecution against him in the Southern District were ordered. There would then be two indictments pending against him. The Attorney General, acting within his well-recognized powers (*infra*, pp. 37–39), would have the right to elect under which of the two indictments he would prosecute. Obviously, for the reasons given to the District Court in requesting dismissal of the Southern District indictment (R. 22–27, 40–42, 53–55), he would choose not to proceed under that indictment but rather under the one now pending in the Western District. The court for the Southern District might then dismiss the Southern District indictment for want of prosecution, which would have exactly the

[17] This distinction has been recognized in Rule 48 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 4), which states that a district court has no power to allow dismissal during trial, without the consent of the defendant.

same effect as the *nolle prosequi* dismissal already entered.

We have found no decision that a court will make the choice for the Attorney General as to which indictment he must prosecute, if jurisdiction lies in more than one court. On the contrary, the pertinent authorities are the other way.

In *Pomerantz* v. *United States*, 51 F. 2d 911 (C. A. 3), the indictment upon which defendant was tried and convicted was returned later than an indictment in another district charging the same offense. The first indictment was dismissed by *nolle prosequi* six days after return of the second indictment. These circumstances are identical with the case at bar, except that in our case petitioner has not yet been convicted and is not yet before this Court seeking review on the merits of a conviction. The defendant argued on appeal that the prior indictment vested exclusive jurisdiction in the first district court. The Court of Appeals held that the court in the second district had jurisdiction to try the case regardless of the first indictment, relying on this Court's decision in *Haas* v. *Henkel*, 216 U. S. 462. Thus the District Court in the Western District of Texas will be entirely justified in proceeding with the trial of petitioner, even if it were to be held that his indictment in the Southern District should be reinstated. There being jurisdiction and venue in both the Southern and Western

Districts, the power of the district in which the second indictment is returned is in no way hampered by the circumstance that a previous indictment has been returned in another district.

This was made very clear by the Court in *Haas* v. *Henkel*, 216 U. S. 462. Indictments were returned against the defendant in both the District of Columbia and in New York. Removal was sought on the District of Columbia indictments, which was opposed by the defendant on the ground that indictments for the same offense had been returned in New York, and that this was the defendant's residence. The defendant introduced the New York indictments at the removal hearing and claimed that they were a bar to his removal and trial in the District of Columbia. Removal was had, and was upheld by this Court. It was held that the New York indictments did not alter the fact that the District of Columbia indictments showed probable cause, and, jurisdiction existing in both places, the District of Columbia had the right to try the defendant on the indictments returned there, irrespective of the circumstance that jurisdiction was also proper in New York. This Court expressly stated that choice of the jurisdiction in which to prosecute was that of the Attorney General, saying, of offenses committed in more than one district (216 U. S. at 474):

> In such a case § 731, Rev. Stat., makes it cognizable in either. *But, if indicted in*

> *two or more districts, there must be an election as to where the defendant shall be tried. Primarily, this is the right and duty of the Attorney General, or those acting by his authority.* [Emphasis added.]

In contending that injury is not a requisite to appealability, petitioner says there is an analogy in judgments of non-suit in civil actions (Pet. Br. 26–27). These cases, presented to and rejected by the court below (R. 94–96), do not aid petitioner, since appeal in such cases is permitted only where there has in fact been an aggrievement of the defendant. Thus, in *Cybur Lumber Co.* v. *Eckhart*, 247 Fed. 284, 285 (C. A. 5), upon which petitioner particularly relies, the court cited examples where allowance of a non-suit in a civil action might defeat a right of and result in injury to the opposing party "as where the pleadings of the defendant entitle him to cross-relief, or to a decree against the plaintiff, or where his counterclaim would be barred by the statute of limitations if the plaintiff was allowed to dismiss his action". See also *Williams* v. *Breitung*, 216 Ill. 299, 303, 74 N. E. 1060, 1064. Unlike a non-suit entered in a case in which the defendant had some affirmative right to relief, dismissal of this indictment in the Southern District could not, in and of itself, possibly injure petitioner.

B. The order of dismissal does not constitute an appealable final order, since it does not terminate the prosecution relating to the income tax matters in controversy

A second obstacle to petitioner's standing to appeal is presented by the absence of an appealable final order. The kind of a decision having the requisite degree of finality necessary for appeal in a criminal case was clearly defined by Chief Justice Hughes in *Berman* v. *United States*, 302 U. S. 211. In that case the Court of Appeals had held that, since sentence had been imposed but suspended, the judgment was interlocutory, thus necessitating dismissal of the appeal. This Court reversed, explaining what constituted an appealable final decision in a criminal case as follows (302 U. S. at 212-213):

> Petitioner was convicted and sentenced. Final judgment in a criminal case means sentence. The sentence is the judgment. * * * Here, the imposition of the sentence was not suspended, but only its execution. The sentence was not vacated. It stood as a final determination of the merits of the criminal charge. To create finality it was necessary that petitioner's conviction should be followed by sentence * * * but when so followed the finality of the judgment was not lost because execution was suspended. In criminal cases, as well as civil, the judgment is final for the purpose of appeal "when it terminates the litigation * * * on the

> merits'" and "leaves nothing to be done but to enforce by execution what has been determined."

See also *Korematsu* v. *United States*, 319 U. S. 432, 435. Since the prosecution against petitioner has not been terminated on the merits by the order dismissing the Southern District indictment, that order is not "final for the purpose of appeal".

In *Cobbledick* v. *United States*, 309 U. S. 323, the Court held that an order denying a motion to quash a subpoena was not a final decision within the meaning of the statute authorizing appellate review. Mr. Justice Frankfurter, for the Court, made a thorough study of appellate jurisdiction, beginning with the first Judiciary Act of September 24, 1789. His words point up the necessity of finality and the danger of delay inherent in piecemeal appeals (309 U. S. at 324–327):

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. * * * To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially com-

> pelling in the administration of criminal justice. * * * [E]ncouragement of delay is fatal to the vindication of the criminal law. Bearing the discomforture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. * * *.
>
> In thus denying to the appellate courts the power to review rulings at *nisi prius*, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality—the idea underlying "final judgments and decrees" in the Judiciary Act of 1789 and now expressed by "final decisions" in § 128 of the Judicial Code—is not a technical concept of temporal or physical termination. * * * "In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court."

This makes it very clear that the "final decision" in the Judicial Code means the same in a criminal case as the "final judgments and decrees" in the first Judiciary Act of 1789, and as the "final judgment" in a criminal case of which Chief Justice Hughes and a unanimous Court spoke in *Berman* v. *United States*, 302 U. S. 211.

Petitioner thus finds himself upon the horns of a dilemma as regards his claims of finality and aggrievement. His claim of finality rests upon an attempt to treat the order of dismissal as one finally terminating his prosecution in the Southern District (Pet. Br. 24–26). His claim of aggrievement seems to rest upon the pendency of the Western District indictment. If it is necessary to join the dismissal in the Southern District with the return of the new indictment in the Western District for the purpose of demonstrating that he has been injured and to avoid mootness, petitioner cannot then at the same time disassociate and separate the two indictments in the two districts for the purpose of alleging finality of the action on the Southern District indictment. If the dismissal is to be viewed in conjunction with the second indictment, then the order of the Southern District is obviously not a final order, but simply an intermediate and interlocutory step in the criminal proceedings against him. Those proceedings can then only be made final for purposes of appeal by petitioner's conviction and sentencing following trial in the Western District. All rulings of which he complains must await appellate review on an appeal from such a conviction. *Berman* v. *United States*, 302 U. S. 211; *Heike* v. *United States*, 217 U. S. 423; see also *infra*, pp. 46–47.

C. The order of dismissal does not appear to be appealable under any of the exceptions to the final order rule, and is not subject to review by prerogative writ

In an attempt to avoid the apparent absence of aggrievement and the rule of finality, petitioner seeks (1) to bring his case within the exceptions which this Court has made to the final order rule in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541; *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684; and *Stack* v. *Boyle*, 342 U. S. 1, 6 (Pet. Br. 27–28); or (2) review by way of mandamus and prohibition (Pet. Br. 28–29). Petitioner contends that, if he is required to go to trial on the second indictment in the Western District, the question of whether the indictment in the Southern District was properly dismissed would not be merged in the final judgment in the Western District, and, at any rate, it would then be too late effectively to review the question (Pet. Br. 27–28).

1. We understand *Cohen*, *Swift* and *Stack* to establish these principles: "An order that does not 'terminate an action' but is, on the contrary, made in the course of an action, has the finality that § 1291 requires for appeal if (1) it has 'a final and irreparable effect on the rights of the parties', being 'a final disposition of a claimed right'; (2) it is 'too important to be denied review'; and (3) the claimed right 'is not an ingredient of the cause of action and does not require consideration with it'." See *United*

States v. *Cefaratti*, 202 F. 2d 13, 16 (C. A. D. C.), certiorari denied, 345 U. S. 907.

Applying these principles to the instant case, petitioner does not appear to have shown that he is entitled to any of these exceptions to the rule of finality. Contrary to petitioner's statement (Pet. Br. 27–28), the proceedings on the motion to dismiss in the Southern District will be merged in a final judgment in the Western District. For, as petitioner told the Court of Appeals (R. 88), he has already incorporated the proceedings on the motion to transfer in the Southern District into the record of the proceedings on the second indictment in the Western District. Furthermore, he has moved in the Western District to dismiss that indictment or to transfer it to the Southern District on the grounds that he had a vested right to be tried in the Southern District (R. 87–88).[18] He will have a further opportunity before trial to renew or present additional motions to preserve his allegation of error. *Cogen* v. *United States*, 278 U. S. 221, 224.[19]

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[18] See also the reporter's transcript from the Western District of Texas, on file with this Court, which incorporates in full the motion reply, order, etc., on the transfer in the Southern District.

[19] Indeed, if this Court considered the case on the merits and overruled petitioner at this time and he was therefore forced to trial in the Western District he may perhaps have a second bite at the apple. If the principles of *res judicata* do not bar, he possibly can relitigate the same issues on appeal, after conviction, having saved them for review by his motion to dismiss and to transfer the indictment.

There is likewise no merit to petitioner's other contention (Pet. Br. 28) that it will be too late to review effectively the dismissal order in the Southern District after conviction and sentencing on the second indictment in the Western District. If petitioner's contentions are correct that Judge Kennerly abused his discretion in dismissing the Southern District indictment (Pet. Br. 19–23), and that petitioner in fact had a vested right to have his trial in Laredo by virtue of the transfer order (Pet. Br. 12–19), then it follows that petitioner would have been improperly tried on the second indictment in the Western District and he would be entitled to a reversal.

Unlike the situation in the *Cohen, Swift* and *Stack* cases where irreparable injury would have been done the petitioners if their injuries were not redressed at that juncture, petitioner will not have been hurt if his appeal must await the final disposition of the case in the Western District. For, as we have shown, his alleged right to be tried on the first indictment in the Southern District has not yet been finally disposed of, will not be denied ultimate review, and is now an ingredient of the cause of action in the Western District. Therefore, what petitioner's contention amounts to, when reduced to its essence, is that he will be put to the inconvenience and expense of a trial before he can be heard on his contention of error. But if a defendant is to be allowed to appeal prematurely from adverse rulings because if up-

held the trial would have been in vain, the salutary rule against piecemeal appeals will have been defeated. This Court has long held that this possibility does not warrant departure from the rule of finality. *Cobbledick* v. *United States*, 309 U. S. 323, 325; *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30; *Heike* v. *United States*, 217 U. S. 423.

2. The only possibility of which we are aware, and we mention this with great hesitation in view of the strong and desirable policy against permitting piecemeal appeals, is the recognition of a new exception to the rule of finality. Such an exception has been put forward to permit an appellate court, which has heard argument on the merits of some matter which is found to be not properly appealable, nevertheless to determine the issues raised if the court finds, as did the First Circuit in *Holdsworth* v. *United States*, 179 F. 2d 933, 935, that "the practical need for clarification overcomes the reluctance to issue what may be termed obiter dictum". In the instant case, the course of further proceedings under the Western District indictment should be greatly simplified, with a resulting avoidance of the possibility of substantial delay and expense, by a definitive ruling from this Court on the matters relating to the merits on which certiorari was granted.

3. If the issues relating to the merits are reviewable under some exception to the rule requiring a final appealable judgment, there is no

need to consider the application for the issuance of the prerogative writs of mandamus and prohibition sought by petitioner from this Court in No. 202 Misc., which is now pending on petition for leave to file. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541. On the other hand, if the District Court's order of dismissal is not appealable, there is no occasion for this Court to grant the extraordinary relief of mandamus or prohibition. The isuance of such writs is not only a matter of sound discretion, but is narrowly restricted to those cases in which the writ is necessary to protect appellate jurisdiction. 28 U. S. C. 1651 (a) (*supra*, p. 4); *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25; see also Rule 30 of the Revised Rules of the Court.

The traditional use of the writs in aid of the appellate jurisdiction has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. They have also been used where appellate review would otherwise be defeated. Such were the cases cited by petitioner.[20] The court in the Western District exercised jurisdiction which it had lawfully acquired over both petitioner and the offense

[20] *United States* v. *Smith*, 331 U. S. 469; *Maryland* v. *Soper*, 270 U. S. 9, 30; *Virginia* v. *Rives*, 100 U. S. 313, 329; *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (C. A. 2), certiorari denied, 340 U. S. 851; *Atlantic Coast Line R. Co.* v. *Davis*, 185 F. 2d 766 (C. A. 5).

involved in the indictment. When that court refused to transfer the case or to dismiss the indictment returned by a grand jury of its district for an offense allegedly committed there (R. 87–88), there was no repudiation of jurisdiction but, on the contrary, a lawful exercise of it. Petitioner will not be deprived of his appellate review of the Western District's denial of these motions at the appropriate time, in the event of a conviction. The petition for leave to file in No. 202 Misc. should be denied.

Petitioner's application for a writ of certiorari also covered the denial of his request made to the court below for writs of mandamus and prohibition requiring Judge Rice of the Western District of Texas to stay the proceedings on the indictment returned in that district [21] (R. 89–90). Since Judge Rice subsequently granted a con-

[21] Petitioner says (Pet. Br. 28–29) that the court below could also have ordered Judge Rice to transfer the proceedings on the second indictment to the Southern District. However, petitioner did not ask the court below for that relief, merely that it stay the proceedings (R. 89–90).

In any event, the second indictment could not have been transferred for trial to the Southern District since the venue allegations of filing the false return were not alleged as having also occurred in the Southern District, but only in Austin, in the Western District, where the Internal Revenue office was located. Moreover, Rule 21 (b), Federal Rules of Criminal Procedure, requires that the transfer shall be in the interest of justice, and Judge Kennerly had already found that justice required the case to be tried away from the Southern District (R. 78).

tinuance, on motion of the government, until after disposition of the case in this Court, there is no longer any occasion to issue the writs in order to preserve the status quo. Thus this phase of the case has been rendered moot.

II

BY GRANTING PETITIONER'S MOTION CHANGING VENUE FROM ONE DIVISION TO ANOTHER IN THE SOUTHERN DISTRICT, THE COURT DID NOT LOSE ITS DISCRETIONARY POWER TO PERMIT DISMISSAL OF THE TRANSFERRED INDICTMENT ON MOTION OF THE GOVERNMENT

For the reasons set forth above, the order dismissing the Southern District indictment is not subject to review by prerogative writ (*supra*, pp. 47–49), and does not appear to be appealable (*supra*, pp. 33–47). However, as we have already indicated (*supra*, p. 33), we would prefer, if possible, to have a decision on the merits, so as to expedite and simplify the ultimate disposition of the Western District prosecution.

1. Petitioner's basic contention (Pet. Br. 12–19) relates to the District Court's claimed total lack of power, under the Federal Rules of Criminal Procedure, to grant the government leave to dismiss an indictment, following a change of venue, over the indicted defendant's objection, even at a time when no date for trial had been fixed or requested by the defendant. This claim is advanced in absolute terms and as admitting of

no exception, no matter how strongly the interests of justice would be better served by permitting the dismissal. This novel contention is wholly unsupported by the language, purposes or history of the applicable rules. Furthermore, no court has either held or suggested that under the rules such a limitation on the court's discretionary power to approve a dismissal was ever contemplated.

Thus petitioner argues that, when Judge Kennerly of the Southern District granted the motion to transfer the case from the Corpus Christi Division to the Laredo Division, venue was forever lodged in the latter place, with the result that if petitioner is ever to be tried for willful evasion of his 1949, 1950 and 1951 income taxes it must be at Laredo.

2. In support, petitioner seizes upon the language of Rule 21 (c) (*supra*, p. 6), which provides that upon transfer of a case "the prosecution shall continue in that district or division", saying: "[t]his is a mandatory requirement that, once there has been an order of transfer, the prosecution shall continue in the second court" (Pet. Br. 14). There is nothing in the history, text, or context of Rule 21 (c) to support petitioner's contention that the rule was intended to vest an irrevocable right in him to have his trial in the district of transfer at all costs. To the contrary, the purposes of Rule 21 (c), which deals only

with the mere mechanics of a transfer, are apparent on its face. It simply provides that the clerks will transmit and receive the papers in the proceeding and that the prosecution shall then continue in the new district or division.[22] If more is needed to show that Rule 21 (c) was meant to be simply explanatory of the transfer proceeding, and nothing else, it is to be found in the original wording of the phrase when it appeared as part of Rule 40 (c) (2) in the Preliminary Draft of the Rules of Criminal Procedure: "and the proceeding shall continue in that district or division as if the indictment or information had been filed there".

Rule 48 (a) authorizing "leave of court" to dismiss an indictment is not expressly or by implication subject to a limitation that it applies in all situations except where there has been a

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[22] That there was no purpose by Rule 21 (c) to make an irrevocable transfer is also shown by the notes of the Advisory Committee on the Rules of Criminal Procedure. Their note to subdivision (c) of Rule 21 refers the reader to Rule 20, which also uses the identical phrase "the prosecution shall continue in that district". Despite this language, the next sentence in Rule 20 contemplates a situation where the prosecution does *not* continue in that district. The next sentence reads: "If after the proceeding has been transferred the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court."

transfer of a case under Rule 21, as petitioner argues. This rule provides:

> The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

Thus the rule expressly limits the court's power to dismiss without the defendant's consent only to cases where the trial has begun, thereby preserving the common law rule that a *nolle prosequi* could not be granted over a defendant's objection once trial had begun, without operating as a bar to further prosecution. See Orfield, *Criminal Procedure From Arrest to Appeal* (N. Y. Univ. Press, 1947), pp. 338–340. If a further limitation on the court's *power* had been contemplated, as suggested by petitioner, it would most certainly have been spelled out. Obviously the fact of transfer has no bearing on the power of the court to dismiss in a proper case.[23]

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[23] The occasions when a proceeding on an indictment would not "continue" in the new district or division are the same occasions in which a proceeding on an indictment would not continue in the original district. Thus the court could dismiss the indictment for want of prosecution under Rule 48 (b). This course would apparently have been abhorrent to petitioner who is insistent on being prosecuted in Laredo. The court could also grant "leave of court" to dismiss the indictment or counts thereof under Rule 48 (a) for a number

3. As a facet of his argument relating to the alleged lack of power to dismiss, petitioner contends that the Attorney General no longer can make a choice of the place of prosecution on two indictments pending in different districts, since the end result is to cause a transfer and Rule 21 provides that transfers can be made only on motion of the defendant. In support of this contention, petitioner quotes part of a sentence from the notes of the Advisory Committee on the Federal Rules of Criminal Procedure. The quoted portion states that the right to move to transfer is not extended to the prosecution (Pet. Br. 16). The Advisory Committee's complete statement is as follows:

> The rule provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution, since the defendant has a constitutional right to a trial in the district where the offense was committed. Constitution of the United States, Article III, Sec. 2, Par. 3; Amendment VI. By making a motion for

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of reasons. For example, a court could authorize dismissal, where there has been a substantial sentence for another offense growing out of the same activity, or where the defendant has pleaded guilty to some counts of an indictment (*United States* v. *Doe*, 101 F. Supp. 699 (D. Conn.)) or where, as in the instant case, a grand jury in a different district has returned an indictment for the same offense (*Haas* v. *Henkel*, 216 U. S. 462; *Pomerantz* v. *United States*, 51 F. 2d 911 (C. A. 3); cf. *United States* v. *Thompson*, 251 U. S. 407).

> a change of venue, however, the defendant waives this constitutional right.

Petitioner's argument is thus squarely rebutted by the reason specifically given by the Advisory Committee for not extending the right of transfer to the prosecution, *i. e.*, because of the constitutional right of a defendant to trial where the offense was committed.[24] In the instant case, the offense was also committed in the Western District. There is therefore no question of transgressing on a constitutional right of petitioner. The Committee's explanation conclusively demonstrates that there is no policy of Rule 21 (b) which could be violated by the action of dismissal in the instant case and the prosecution of petitioner on an indictment in a different district in which the offense was also committed.

The Advisory Committee further pointed out that the effect of Rule 21 is to modify the existing practice under which the government had the final choice of jurisdiction where the prosecution is to be conducted, stating that now the matter will be left to the discretion of the court. That this is so and a court may now cause a transfer

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[24] Although the Advisory Committee did not limit the language quoted above to subsection (a) of Rule 21, it is patent that the Committee's discussion of the constitutional limitation of trial to the district of the offense could not have been referring to Rule 21 (b) which pertains to transfers for offenses that are "committed in more than one district or division".

at the instance of a defendant does not operate to prevent, in a proper case, grand juries of different districts from returning indictments for the same offense against a defendant, and the government from securing "leave of court" to dismiss one of them under Rule 48 (a). Nor is the intent of Rule 21 that "the matter will now be left in the discretion of the court" thwarted in the instant case, since, as shown below at pp. 60–75, Judge Kennerly (a) concluded that the interests of justice would best be served by having the case tried outside the Southern District, and (b) properly exercised his discretion in this regard.

4. Moreover, Judge Kennerly, who granted the motion to transfer to Laredo, was the same district judge who later granted "leave of court" to dismiss the indictment. If necessary, Judge Kennerly's order dismissing the indictment may be viewed as also undoing what he had done in transferring the case to Laredo. Interlocutory orders are not res judicata. However conclusive in its character a judgment, decree or other order may be, it remains under the control of the court which pronounces it. *Bronson* v. *Schulten*, 104 U. S. 410, 415. Judge Kennerly's jurisdiction was coextensive with the judicial district and the Laredo Division was as much within his jurisdiction as the Corpus Christi Division. Cf. *Rosencrans* v. *United States*, 165 U. S. 257, 263. If we view the "leave of court" to dismiss as being

(1) an order vacating the transfer to Laredo and (2) an order dismissing the indictment, both were within Judge Kennerly's power. *United States v. Bryson,* 16 F. R. D. 431, 435 (N. D. Cal.); *Ex parte Altman,* 34 F. Supp. 106, 108 (S. D. Cal.)

III

THE ORDER DISMISSING THE SOUTHERN DISTRICT INDICTMENT CONSTITUED A PROPER EXERCISE OF DISCRETION

A. *The court did not misconceive its functions in permitting the dismissal*

In requesting reversal of the order granting "leave of court" to dismiss the Southern District indictment, petitioner first suggests (Pet. Br. 19–23) that Judge Kennerly did not understand that he had any discretion in the matter. Petitioner claims that the judge "clearly assumed that he had no discretion to deny the Government's motion to dismiss, or that if he had a measure of discretion, it was so limited and circumscribed as to be practically unavailable" (Pet. Br. 21). This contention is directly rebutted by a mere reading of his opinion in context (R. 78–80) together with his statement made during the course of the hearing when he overruled the government's contention that petitioner had no standing to object to the entry of the order of dismissal (R. 48–49).

At the hearing Judge Kennerly explained (R. 48–49):

> I repeat, counsel, that the wording of the rule contemplates that there is some—I don't know how much—discretion with the Judge of the Court. In exercising that discretion, I think I ought to have the facts. If the defendant in the case has any facts he wants to present to me, whether from the District Attorney or otherwise, in the exercise of that discretion, if I have that discretion, I think I should hear it * * *.

In his opinion, he states (R. 79): "Under the rule * * * evidently there is some discretion in the Court as to the matter of whether the case should or should not be dismissed." He also stated (R. 79):

> In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was of course under the old law, and under the present rules. If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown any reasons why the case should not be dismissed.

The above quotations, together with Judge Kennerly's conduct of the hearing and his full ex-

planation of his reasons for granting the dismissal, completely refute petitioner's contention that the judge may have misconceived his functions. Not only did he conduct a full hearing on the motion, over the Government's opposition, but he allowed petitioner to present evidence opposing the dismissal and heard argument from both sides (R. 37–77). He also based his decision on the documents filed in the transfer order (R. 78). Judge Kennerly's action on the dismissal was thus based on all information he could secure to aid him.

Furthermore petitioner fails to set forth at any point in his brief the specific reason Judge Kennerly gave for granting the dismissal. In his opinion on the dismissal order, the judge adverted to his previous order transferring the case to Laredo and to his belief that he had been limited to where he could send the case, saying, in relation to the present dismissal motion (R. 78–79):

> In * * * examining the record, I reached this further conclusion, that I gravely doubted whether in the administration of justice generally, the case should be tried in this district at all. I reached that conclusion, not as favoring either the Government or the defendant, but more from the standpoint of a judge who is charged with the administration of justice in the district.

> But when I came to examine the law, I found that I was without power to transfer the case outside of the Southern District of Texas. * * * If I had had that authority I would have sent it to Amarillo, or Sherman, or Texarkana, or some of those places as far removed from the scene of the troubles as I could, or as I could find. I would have done that not, as I say, to favor either the defendant or the Government, because I feel that justice in the case would be best administered by transferring the case to one of those places.

Judge Kennerly's conclusion that justice would be best administered by trial of the case "far removed from the scene of the troubles" was not mechanical or automatic; it was a logical and sound judgment in the matter, reached after due deliberation. In this setting, the judge then added that petitioner had not shown any reasons why the case should not be dismissed (R. 79). Manifestly, Judge Kennerly was exercising a real discretion in authorizing the dismissal. This exercise of discretion by the trial judge should not be lightly overturned by an appellate court.

B. *The dismissal was proper in view of the finding that the interests of justice would be best served by having the case tried outside the Southern District*

Throughout his brief, petitioner keeps implying that, if Judge Kennerly exercised any discretion at all, he acted so arbitrarily that his order dismissing the indictment constituted an abuse of dis-

cretion, warranting reversal by this Court and an order compelling the government to abandon the Western District prosecution and to proceed with prosecution of the first indictment in the Southern District (Pet. Br. 12–19, 22–23). Petitioner's grounds are: (1) the government had "originally sought an unfair advantage" by first bringing the case in Corpus Christi, in the Southern District, rather than at Austin, in the Western District, which had been the prevailing practice for twenty years (Pet. Br. 17–18); and (2) the government's subsequent course in securing leave of court to dismiss the first indictment in the Southern District and reindicting petitioner at Austin should not be sanctioned, because the result was to evade and render a nullity the transfer to Laredo, and "the prosecution cannot create for itself a transfer power, by a misuse of the power to terminate" (Pet. Br. 16).

1. *Return of the first indictment in Corpus Christi:* A number of perfectly legitimate reasons existed for bringing the prosecution originally at Corpus Christi rather than at Austin. As Judge Kennerly was informed, the government was faced with a serious personnel problem in the Western District of Texas, involving the impending departure of the then incumbent United States Attorney for that district and his staff, with the prospect, since realized, that there would be a very substantial change of that staff during the

time between presentation of the case to the grand jury and its trial (R. 39–40). The problem did not exist in the Southern District since the new United States Attorney had already taken office (*ibid.*).

Moreover, the action of the government in originally bringing the indictment in Corpus Christi comported with the policy enunciated by this Court that a law should be construed to permit the trial of a defendant in his vicinage if possible. *United States* v. *Johnson*, 323 U. S. 273. It likewise comported with the then fairly recently adopted policy of securing wider geographic distribution of tax evasion prosecutions by spreading them throughout the judicial districts, so as to publicize the penalties for violating the income tax laws.[25] Because of simplicity of proof, the manner of tax evasion usually alleged is the filing of the false return where the District Director's office is located. However, in many states there is one Internal Revenue Collection District covering two or more judicial districts. This means that the tax evasion cases for such a state will be centered in the judicial district where the Director is located, rather than at the places of residence of the taxpayers, and the exemplary warning that these prosecutions bring would therefore not be diffused throughout the state.

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[25] Lyon, *The Crime of Income Tax Fraud: Its Present Status and Function*, 53 Col. L. Rev. 476, 478 (1953).

In those cases where there is evidence of affirmative acts of tax evasion in a judicial district where no return is filed, the taxpayer may be prosecuted where these acts occur. *Spies* v. *United States,* 317 U. S. 492, 499. Mindful of the deterring effect of an income tax prosecution on possible tax evaders located in the other judicial districts of a state, the government has, in appropriate cases, emphasized additional evidence showing that affirmative acts were taken by a tax evader in a "non-Director's" judicial district. Thus the records of this Court show that an indictment of that kind was returned in 1952 in *Beaty* v. *United States,* 213 F. 2d 712 (C. A. 4), judgment vacated and remanded on other grounds, 348 U. S. 905, reaffirmed, 220 F. 2d 681, certiorari denied, 349 U. S. 946; and in 1953 in *United States* v. *Albanese,* 224 F. 2d 879 (C. A. 2), certiorari denied, 350 U. S. 845. The United States Attorneys' Manual, prepared by the Department of Justice, states (Title 4, p. 44):

> Most criminal tax offenses arise under the Internal Revenue Code and involve the filing or nonfiling of returns with a particular Director of Internal Revenue. * * * In the usual case, therefore, the offense is committed in the judicial district in which the Director's office is located. Consequently, in those States which have two or more judicial districts but only one internal revenue collection district, the

> great majority of tax prosecutions will be instituted in the one judicial district in which the Director's office is located. However, in an effort to cause the widest possible geographical distribution of tax prosecutions, the Department has encouraged the development of investigative facts which would provide a basis for venue in the residence district of taxpayers in those instances in which the returns are filed in other judicial districts.[26]

Petitioner's was such a case; the indictment was first brought in petitioner's district of residence, the Southern District of Texas, and in Corpus Christi, taxpayer's home division within the Southern District. In thus bringing the prosecution in Corpus Christi, the government was not departing from practice, but was in fact implementing a policy then in existence, albeit a practice that had not theretofore reached the Southern District of Texas.

Petitioner says that the "Government's initial preference to try the case in Corpus Christi must have been due to its desire to avail itself of the prejudice there" (Pet. Br. 17). Petitioner asks this Court to penalize the government by requiring it to continue the prosecution at Laredo, so that "[i]f as a result of picking an unfair forum it lost the chance to prosecute at Austin, the Government has learned the risks of an original

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[26] The quoted matter is identical both in the sheet in the current manual and in the superseded sheet dated November 1, 1953.

unfair choice" (Pet. Br. 18–19). But petitioner's display of indignation is belied by his own action in preferring Corpus Christi over any place-of-trial other than Laredo. Before Judge Kennerly had rendered his decision that prejudice existed against petitioner in Corpus Christi and that his case should be transferred, petitioner had told the court (R. 17):

> We wish to be clearly understood that if the case is not to be transferred to Laredo we prefer that it remain in Corpus Christi.

The United States Attorney stated that he had supposed that petitioner would have been satisfied to try his case on his home grounds (R. 41). The government had a choice of bringing the prosecution in Austin or Corpus Christi. The evasion did not occur at Laredo and the government could not have alleged venue there. Petitioner has resisted trial at Austin, the only other place, besides Corpus Christi, where venue would have been proper, absent a waiver by petitioner. In these circumstances, the government could not have been seeking an unfair advantage in bringing the first indictment in Corpus Christi when petitioner has insisted on being tried there if not in Laredo.

Moreover, petitioner's insistence on Laredo over Corpus Christi is subject to the inference that it was for a purpose other than interest in a fair trial. When petitioner requested transfer

of his case from the Corpus Christi Division, petitioner's place of residence, to the Laredo Division, the seat of his political power, the government vigorously opposed it (*supra*, pp. 10–12). A transfer to secure a fair trial, the government did not oppose (R. 124). It made no objection to transfer to the Houston or Galveston Divisions of the Southern District nor to transfer to another judicial district, but filed answering affidavits strongly indicating that the government could not secure a fair trial at Laredo.[27] The principal source of the prejudice alleged by petitioner was from the influence of three newspapers. Although it was true these newspapers had much greater circulation in Corpus Christi, the government pointed out that nevertheless their circulation was still fifty times greater in Laredo than, for instance, in Houston (R. 125).

If petitioner's real purpose had been to avoid the alleged baleful influence of those newspapers, then he should have sought a transfer to one of those other divisions of the Southern District where the newspapers' influence was much smaller. While Judge Kennerly stated on April 27, 1955, that the government would not "be under a severe handicap" by trial at Laredo (R. 18–19), this conclusion must be read with Judge Kennerly's statements on May 16, 1955, that he

[27] See footnote 6, *supra* p. 11.

"gravely doubted whether in the administration of justice generally, the case should be tried in [the Southern D]istrict at all" and that the case should have been sent as far from the scene of the troubles as could be found (R. 78).

Judge Kennerly believed that petitioner, in moving to transfer his case under Rule 21 (a), Federal Rules of Criminal Procedure, could limit the venue to a particular place of his own choosing, in this case Laredo, and that the court was totally powerless to send it elsewhere for trial (R. 16–18). The government contended that petitioner had no such right and that the trial judge was in error in so holding. The government argued that, if petitioner sought to take advantage of the transfer provisions of Rule 21, he could not conditionally waive his right to trial in the district and division of the crime so as to pick the exact place where he chose that the trial should be held. He was entitled to a fair trial and nothing more. However, Judge Kennerly granted the transfer, and "it is at least doubtful whether the Government had a right to appeal from the order of transfer".[28] *United States* v. *National City*

[28] The cases cited by petitioner, all involving mandamus proceedings, do not support his contention that the government could have sought appellate review of the judge's order of transfer. Thus, in *United States* v. *United States District Court*, 209 F. 2d 575, 576 (C. A. 6), on which petitioner particularly relies, the court found that mandamus was appropriate to resolve the "judicial stalemate" existing because both district courts refused to assume jurisdiction of

Lines, 334 U. S. 573, 594; *Holdsworth* v. *United States*, 179 F. 2d 933, 935 (C. A. 1); cf. *Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360 (C. A. 4), certiorari denied, 338 U. S. 947.

If there be error in the record, it is in Judge Kennerly's view that, under Rule 21 (a) of the Federal Rules of Criminal Procedure, petitioner could force trial in a chosen sanctuary. It has been uniformly held that the provisions found in Article III, Section 2 of the Constitution and in the Sixth Amendment, as to the right of trial in the district, are not jurisdictional and can be waived. *Shetterly* v. *United States*, 205 F. 2d 834 (C. A. 6); *Mahaffey* v. *Hudspeth*, 128 F. 2d 940 (C. A. 10), certiorari denied, 317 U. S. 666; *Hagner* v. *United States*, 54 F. 2d 446 (C. A. D. C.), affirmed, 285 U. S. 427. In accordance with this principle, the Advisory Committee, in reference to Rule 21, stated: "By making a motion for a change of venue, however, the defendant waives this constitutional right" (*supra*, pp. 54–56). Cf. *United States* v. *Gallagher*, 183 F. 2d

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the offense. In the instant case there is no district court conflict. The Southern District Court dismissed its indictment and released its jurisdiction and the Western District Court assumed jurisdiction over the trial under the indictment returned in that district. The issue was not reached in *General Portland Cement Co.* v. *Perry*, 204 F. 2d 316, 318 (C. A. 7). Mandamus was held to be appropriate in *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 116 (C. A. 3), certiorari denied, 340 U. S. 953, on the ground that the District Court had refused to act. There has been no refusal to act in support of its jurisdiction by any District Court in the instant case.

342 (C. A. 3), certiorari denied, 340 U. S. 913; *United States* v. *Bryson*, 16 F. R. D. 431, 434 (N. D. Cal.).

Thus when petitioner brought his motion to transfer, he necessarily waived the constitutional privilege to have his trial in the district and division of the offense. Inconsistent with this waiver was petitioner's condition that the case be sent only to Laredo. Having executed the waiver of venue, petitioner could not reassert it for the purpose of directing the court where to send the case. The transfer should have been where the court found the administration of justice and fairness, both to petitioner and to the government, required the case to be sent. That Judge Kennerly was conscious of the implications of his decision to transfer to Laredo is apparent when, in the course of his opinion in authorizing the dismissal, he stated he had originally believed that the administration of justice required the case to be sent as far away from the scene of the troubles as could be found (R. 78). If there be any action at all required from this Court on the original indictment in the Southern District at this juncture, it should be a direction to the District Court for the Southern District to transfer the case where it thought the proper administration of justice required it to be sent.

2. *The return of the new indictment in the Western District and the dismissal of the South-*

ern District indictment: There is no merit to petitioner's further contention that the return of the indictment against petitioner by the grand jury for the Western District, which had jurisdiction of the offense, and the government's dismissal of the first indictment pending against petitioner in the Southern District after securing "leave of court" to do so, constituted a misuse of the power to terminate[29] (Pet. Br. 14–19).

If petitioner has committed a crime in the Western District, the power and duty of the grand jury for that district to consider it and re-

[29] In *Ex parte Lancaster*, 206 Ala. 60, 89 So. 721, upon which petitioner relies (Pet. Br. 14–16), the defendant had been indicted in Walker County, the place of the crime, and the case had been transferred for trial to Marion County because of prejudice. When defendant was tried in Marion County, the jury could not agree and a mistrial was declared. The prosecution thereupon had a *nolle prosequi* entered in the case, and reindicted the defendant again in Walker County. Thus, the defendant had already been forced to trial once in the county of transfer and the state was attempting to re-try him in the county where prejudice against the defendant existed. The basis of the decision holding that the trial must be in Marion County was that jurisdiction of the offense had been irrevocably lodged in Marion County and also that there was a state statute forbidding removing the case more than once. In the instant case, exclusive jurisdiction over the offense has not been lodged at Laredo in the Southern District.

Coleman v. *State*, 83 Miss. 290, 35 So. 937, quoted by petitioner (Pet. Br. 16), involved, as noted by the court below (R. 95), a particular statute of the state providing that the county where prosecution is first begun shall have exclusive jurisdiction of the cause. There is no such federal statute or rule. *Haas* v. *Henkel*, 216 U. S. 462.

turn an indictment is unquestioned, and the right and duty of the Government through the Attorney General and the United States Attorney to initiate prosecutions for crime is coterminous with the power of the grand jury. *Haas* v. *Henkel*, 216 U. S. 462, 473–475; *United States* v. *Morgan*, 222 U. S. 274, 281–282; *United States* v. *Thompson*, 251 U. S. 407, 412–415; *Ex parte United States*, 287 U. S. 241, 250–251. That an indictment had also been returned earlier in the Southern District naming petitioner as the defendant cannot vitiate his indictment for the same offense in the Western District. "But, if indicted in two or more districts, there must be an election as to where the defendant shall be tried. Primarily, this is the right and duty of the Attorney General, or those acting by his authority." *Haas* v. *Henkel*, 216 U. S. at 474; see *supra*, pp. 36–39. In making such an election, "it would be the plain duty of the prosecution to take steps to bring the case to trial in that district to which the facts most strongly pointed" (*ibid.*). Cf. *Pomerantz* v. *United States*, 51 F. 2d 911, 912 (C. A. 3). The only modification of the *Haas* v. *Henkel* rule is that the dismissal of one of the indictments is now subject to "leave of court" under Rule 48 (a).

However, this authority was in fact sought and secured. Both Judge Kennerly in the Southern

District and Judge Rice in the Western District properly exercised their discretion that the prosecution should be discontinued in the Southern District and be carried on in the Western District.

Nevertheless, petitioner urges that the sequence of events whereby the new indictment was returned and the old one dismissed after the case was ordered transferred to Laredo shows an attempt to circumvent the court's decision and was "a fundamental evasion of the integrity of the transfer procedure contemplated by Rule 21" (Pet. Br. 19) and was "a device by which the Department of Justice seeks to obtain for itself, and to deny to the courts, the power to choose the forum to which trial of a criminal case may be transferred" (Pet. Br. 22).

The effect of the return of the new indictment in the Western District and grant by Judge Kennerly of "leave of court" to dismiss the first indictment in the Southern District was indeed to negate the transfer order, since the case would not be prosecuted in the Southern District at all. But to say that the effect was to circumvent the court's transfer order and was a fundamental evasion of Rule 21 is to forget that both the transfer and the dismissal motions occurred before Judge Kennerly. There could not

very well be a circumvention or evasion of Judge Kennerly's transfer order by virtue of the dismissal order when Judge Kennerly was also a party to it.

The government fully informed Judge Kennerly of the reasons why the sequence of events made necessary and desirable the request for "leave of court" to dismiss the indictment in the Southern District. It was pointed out to him that, faced with trial in Laredo if the Southern District indictment were to be tried at all, the Assistant Attorney General and the United States Attorney had to make a new judgment about the prosecution. They stated they knew that their witnesses, who were reluctant or hostile, would be subject to greater potential pressure if required to testify so close to the seat of petitioner's political power, and that these witnesses would testify more freely and frankly and more to the truth of the matters to be proved the further removed they were from the American-Mexican border area in which Laredo was located (R. 41–42).[30] The United States Attorney specifically mentioned one witness, a Mr. Benson, who was in the employ of petitioner, had signed the tax

[30] "We would be naive if we did not recognize that witnesses in criminal cases are subject to pressures from all sides." *United States* v. *Bryson*, 16 F. R. D. 431, 436 (N. D. Cal.).

returns and lived in the Laredo area and who might be affected by these considerations (R. 50–53). Further, under the allegations of the first indictment in the Southern District the Government was required to prove affirmative acts of evasion independent of and in addition to proof that petitioner had willfully filed a false income tax return at Austin. It is true, as the United States Attorney stated to Judge Kennerly, that the same witnesses would be used in proving the case under either indictment; but the extent of their testimony and the manner of their testifying and the quality of their evidence might not be of critical importance under the simpler proof involved in the second indictment.

In short, the prosecutors who knew their case, its strength and weaknesses, were required to make a new estimate, and believed that their case would be more appropriately tried in the Western District. If it is the duty of the Attorney General and the United States Attorney to decide when or where to initiate a prosecution, inherent in this is the concomitant responsibility to determine when to discontinue a prosecution.[31]

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[31] The usual occasions for criticism of dismissals have been where it has appeared to the court that the dismissal would result in inadequate or no prosecution and punishment of the defendant. *United States* v. *Doe*, 101 F. Supp. 609 (D. Conn.); *United States* v. *Woody*, 2 F. 2d 262 (D. Mont.). There is no question here of petitioner escaping prosecution for the offense, as a result of the dismissal of the Southern District indictment.

Although it was the duty of the government to make the reappraisal in view of the new circumstances, this was nevertheless subject to review by the District Court when the government moved under Rule 48 (a) for the dismissal. Judge Kennerly held a hearing, allowed petitioner to offer evidence, heard argument from both sides and determined thereafter that the proper administration of justice required that the dismissal of the indictment should be granted since the case should have been tried as far away from the scene of troubles in the Southern District as could be found. "But justice, though due to the accused, is due to the accuser also." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122.

The Government requested the dismissal for proper reasons and Judge Kennerly exercised a sound discretion in the matter, which should be left undisturbed.

CONCLUSION

In the event that this Court agrees with the Court of Appeals that the District Court's order dismissing the indictment is not appealable, the judgment of the Court of Appeals dismissing petitioner's appeal should be affirmed. In the event that this Court reaches the merits of the

District Court's order dismissing the indictment, that order should be affirmed.

Respectfully submitted.

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MARCH 1956.

APPENDIX

AFFIDAVITS OF HAYDEN W. HEAD SUBMITTED ON BEHALF OF PETITIONER AND THE GOVERNMENT IN CONNECTION WITH THE CHANGE OF VENUE MOTION

1. Affidavit that petitioner could not expect a fair trial in the Corpus Christi Division

THE STATE OF TEXAS,
County of Nueces, ss:

BEFORE ME, the undersigned authority, on this day personally appeared Hayden W. Head of Nueces County, Texas, known to me to be a credible person, who being first sworn, stated to me under oath the following:

After graduation from the law school of the University of Texas in 1937 and admission to practice in this state, I moved to Corpus Christi where I was employed by the firm of Keys & Holt, a partnership composed of I. W. Keys and Birge Holt, which was engaged in the general practice of law in Corpus Christi. Shortly afterward I was admitted to practice in the United States District Court for the Southern District of Texas. From June of 1937 until the month of September, 1941, when I became a partner in the firm and the firm name was changed to Keys, Holt, & Head, and thereafter until the month of January, 1942, I was actively engaged in the general practice of law in Corpus Christi and during that time tried many law suits in the local courts.

In January, 1942, I left to go into military service and was discharged from the United States Army Air Force in September of 1945, being away from Corpus Christi that entire period. Upon my return to Corpus Christi in September of 1945, I again resumed the general practice of law with the firm of Keys, Holt & Head and continued with that firm until I withdrew from it on February 1, 1948, and engaged independently in the general practice of law in such city until February, 1949, when I moved to Austin, Texas, and there established an office. However, I continued to maintain an office in Corpus Christi and spent a portion of each week there until I moved back to Corpus Christi from Austin on February 1, 1954. At that time I closed my Austin office and have practiced exclusively from my Corpus Christi office since.

Not long following my return after being discharged from the Air Force in September of 1945, I became embroiled actively as one of the leaders in a municipal political controversy in Corpus Christi, in which our effort was the recall of the City Council then in office. One of the principal grounds for which recall was sought, it being given wide publicity, was the alleged political domination of some of the then council members by George B. Parr of Duval County, Texas. Much publicity was given in our fight to recall the council to charges that, through some of the council members, Parr was trying to control the City of Corpus Christi by "political bossism". The council resigned after the filing of a recall petition to which some 4500 signatures

were affixed. This was given the widest possible publicity by newspapers and radio throughout the Corpus Christi Division of the United States District Court for the Southern District of Texas and much of this publicity, in which I personally participated, was directed against George B. Parr.

Continuously since the name of George B. Parr has been brought actively to the attention of the public by accusations of one kind or another made in a great many municipal, county and district elections in said Corpus Christi Division. During the entire period since my return to Corpus Christi from military service there has never been a period of more than a few months during which the said Parr has not been the target of many attacks upon his alleged attempts to dominate this area by political corruption. The most recent attacks of this nature occurred during the campaign to elect to Congress a representative from the 14th District, within which the Corpus Christi Division lies. In that election, State Senator William H. Shireman of Corpus Christi, a candidate for this congressional office, devoted a large part of his campaign by newspaper, radio and speeches at public gatherings to attacks on the said Parr throughout the District, alleging among other things that he controlled the judiciary in Duval and Jim Wells Counties, Texas, from which C. Woodrow Laughlin had been just removed as a district judge by the Supreme Court of Texas. I participated actively in Senator Shireman's campaign in support of his candidacy for Congress and know personally that the attacks made by him on Parr

received widespread publicity throughout the Corpus Christi Division.

Since that time, there has been unceasing publicity throughout this division by newspapers and radio publicizing the recent investigation of Parr and Duval County by the Attorney General of Texas and of the indictment or indictments against the said Parr for alleged income tax evasion in the United States District Court.

It is apparent that during the past several years, I have personally engaged in public opposition to George B. Parr and I know with some intimacy the severity of attacks leveled against him and the publicity given those attacks. It is equally apparent that I am not in sympathy with said George B. Parr. However, I feel it my duty as a citizen of Corpus Christi and as a member of the bar of the United States District Court for the Southern District of Texas to make this affidavit, for it is my very firm belief that as a result of the foregoing facts, so great a prejudice exists against George B. Parr as defendant in the recent indictment or indictments returned against him in the United States District Court for the Southern District of Texas, that he cannot obtain a fair and impartial trial in the Corpus Christi Division. I do not believe that it is possible to select a jury for the trial of any case in this division in which he is involved as a defendant where at least some of the jurors would not be prejudiced against the said George B. Parr.

/s/ HAYDEN W. HEAD.

The foregoing was sworn to and subscribed before me, the undersigned authority, as true and correct on this 4th day of February, 1955, by the said Hayden W. Head, to certify which witness my hand and seal of office.

/s/ ANNA GRACE PIERCE,
Notary Public in and for
Nueces County, Texas.

2. *Affidavit that the government could not expect a fair trial in the Laredo Division*

THE STATE OF TEXAS,
County of Nueces, ss:

BEFORE ME, the undersigned authority, on this day personally appeared Hayden W. Head of Nueces County, Texas, known to me to be a credible person, who being first sworn, stated to me under oath the following:

Heretofore I have made an affidavit relating to George B. Parr which has been filed with the Clerk of the United States District Court for the Southern Division of Texas, Corpus Christi Division, in connection with an indictment or indictments presently pending against the said Parr in such court. In that affidavit I expressed my opinion that the said Parr could not obtain a fair and impartial trial in the Corpus Christi Division of such court.

It is equally my firm opinion that the United States of America could not obtain a fair and impartial trial if the trial of the cause against George B. Parr were transferred to the Laredo Division of such court. I have been a very interested observer of the South Texas political

scene for many years and it is my belief that the situation in the Laredo Division of the United States District Court for the Southern District of Texas is the converse of the situation in the Corpus Christi Division. In the latter division, the defendant could not obtain a fair and impartial trial and in the Laredo Division the government could not obtain a fair and impartial trial.

It is my opinion and belief that such trial could only be had by transfer of this cause to the Houston Division or other division of said court sufficiently removed from Lower South Texas politics that the said George C. Parr would not there have been the controversial and highly publicized figure that he has been throughout Lower South Texas for many years.

/s/ HAYDEN W. HEAD.

The foregoing was sworn to and subscribed before me, the undersigned authority, as true and correct on this 23d day of March, 1955, by the said Hayden W. Head, to certify which witness my hand and seal of office.

/s/ ANNA GRACE PIERCE,
Notary Public in and for Nueces County, Texas.

U. S. GOVERNMENT PRINTING OFFICE: 1956